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## United States Senate

COMMITTEE ON SMALL BUSINESS & ENTREPRENEURSHIP

WASHINGTON, DC 20510-6350

November 4, 2003

BY FACSIMILE  
ORIGINAL BY U.S. MAIL

Colonel John O'Dowd  
Commander and District Engineer  
United States Army Corps of Engineers, New York District  
26 Federal Plaza  
New York, NY 10278-0090

Dear Colonel O'Dowd:

It has come to our attention that the solicitation, as well as the subsequent award of a contract, by the U.S. Army Corps of Engineers (Corps) for design and construction of the Training Area Access Road, First Army Boulevard at Fort Drum Army Base was in violation of Federal Acquisition Regulations, pursuant to the HUBZone Act, 15 U.S.C. § 657(a). As a result, we have a number of concerns regarding the Corps' actions related to the solicitation and award of this contract.

The Small Business Act mandates application of a price evaluation preference to certain Federally funded contracts. If the lowest technically acceptable bid is submitted by other than a small business, the subsequent contract is awarded to the responsive and responsible HUBZone business whose price is not more than 10 percent higher than the lowest bid received. Further, all Federal agencies are responsible for ensuring that prospective offerors are aware of these requirements. It is our understanding that the Corps did not follow these requirements for this procurement.

We understand that the U.S. Court of Federal Claims (COFC) ruled (No. 03-193C, Filed May 19, 2003; and No. 03-193C, Filed June 12, 2003) that the contract award was not technically illegal based on the information available at the time of award. However, on September 30, 2002, in response to the award of the contract to Delaney Construction Corporation, a size protest was filed with the Small Business Administration (SBA), making the Corps aware that the company it selected may have falsely certified as a small business. On October 15, 2002, the SBA issued a formal size determination confirming that the company awarded the contract was indeed not a small business for this procurement and that the next lowest technically acceptable offeror, a qualified HUBZone small business concern, should receive the contract based upon the HUBZone Act.

According to the COFC findings, it was clear the Corps intended to take appropriate corrective action. The Corps also acknowledged to the COFC that it was bound to apply the HUBZone statute to this procurement.

Further, the COFC determined that because the Corps had disclosed the competitors' prices, its proposed corrective action to solicit new price proposals was not feasible and that including the HUBZone provisions in a new solicitation was not necessary since applying the HUBZone statute is not conditioned on the presence of a contract clause.

It is our understanding that the COFC expected and believed that the Corps would comply with the law. We are very concerned that no action has been taken to date to correct this situation.

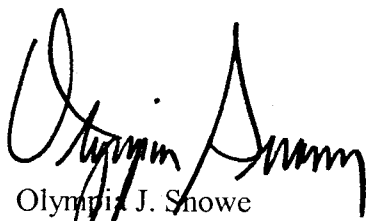
Therefore, as the Chair, Ranking Member and the member of the Senate Committee on Small Business and Entrepreneurship which authored the HUBZone legislation, we are requesting the following information:

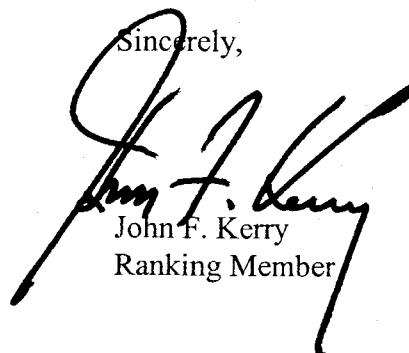
- Explanation as to why the Corps has not yet complied with the HUBZone Act;
- Explanation as to the Corps' intention and proposed method for taking corrective action for this procurement;
- Identification of the number of actions, dollar amounts, and industry type of HUBZone contract awards the Corps, New York District Office, has awarded in the last two fiscal years; and,
- Identification of the number of HUBZone procurements your office has planned for fiscal years 2004 and 2005.


Due to the time-sensitive nature of this ongoing situation, an expedited response to this inquiry is needed, and we would appreciate a response by close of business on Friday, November 14, 2003.

Thank you for addressing this important issue. I look forward to your prompt reply. If you have any questions, please contact Nancyellen Gentile for Senator Snowe or Nigel Stephens for Senator Kerry at (202) 224-5175; or, Macey Small for Senator Bond at (202) 224-5721.

Sincerely,

  
Olympia J. Snowe  
Chair

  
John F. Kerry  
Ranking Member

  
Christopher S. Bond